

***United States Court of Appeals
for the Second Circuit***



APPENDIX

ORIGINAL
DOCKET No. 76-1103

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 76-1103

UNITED STATES OF AMERICA,

Appellee,

-against-

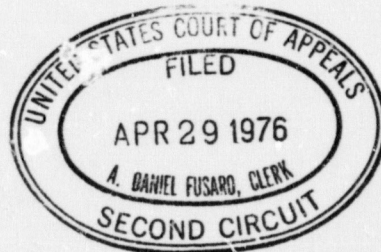
MICHAEL CHARLES VESCERA, JR.
and ANTHONY FERRANTE,

Defendant-Appellants.

On Appeal From the United States District
Court for the Eastern District of New York

APPENDIX IN BEHALF OF APPELLANTS

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1 9 Nadler - direct

2 before, Agent Nadler?

3 A No.

4 Q Now, what information did this informant give
5 you?

6 A The information that he furnished me was to the
7 effect that Anthony Ferrante and others were operating a
8 drop at a building, Metropolitan and Flushing Avenue in
9 Brooklyn, New York.

10 Q Now, could you please explain for the record
11 what a drop is?

12 A A drop is an area where stolen merchandise
13 is usually stored.

14 Q After you received this information what, if
15 anything, did you do?

16 A We conducted an investigation --

17 MR. WEISSWASSER: I object to "we" if your
18 Honor please.

19 MR. SCOTTI: If the witness will be permitted
20 to answer the question and then the Government would
21 determine who the "we" were.

22 THE COURT: Along those lines, I will permit
23 it. The objection is overruled.

24 A Myself and other agents conducted an investiga-
25 tion at this site.

1 10 Nadler - Direct

2 Q What kind of investigation?

3 A We located the area in which the informant advised

4 us about.

5 Q What area was that?

6 A That was at 1956 Flushing Avenue.

7 Q When you say "we," yourself and other agents,

8 can you identify some of those other agents?

9 A Special Agent Gerard M. Collins, Special Agents

10 Armstrong, Edwards, Bolling.

11 Q Would it be fair to say that the agents would

12 vary from time to time?

13 A That's right.

14 Q Would you explain this investigation which you

15 conducted?

16 A We conducted a spotcheck at this warehouse and

17 from time to time we noted some activity there.

18 Q All right.

19 Now, I take it when you say "spot check" you

20 mean spot surveillance?

21 A Yes.

22 Q What activity did you note there?

23 A Also, in the latter part of October I surveilled

24 a car from the Elks Bar on Flushing Avenue in Brooklyn.

25 MR. EVSEOFF: Your Honor, I respectfully object.

1
2 Dumpster, what happened?

3 A We surveilled -- Agent Collins and myself
4 surveilled the truck back to 1956 Flushing Avenue.

5 Q Did the truck --

6 A And discontinued the surveillance.

7 Q What did the truck do when it got to the
8 vicinity of the premises?

9 A It went into the warehouse in 1956.

10 Q What if anything did you do after that?

11 A Agent Collins and myself went back to the Dempsey
12 Dumpster to determine what was placed into the trash receptacle.

13 Q Approximately how long was it from the time
14 that you broke off your surveillance at 1956 Flushing Avenue,
15 after the green step van had returned, to the time you arrived
16 back at the dumpster?

17 A Between five and 10 minutes.

18 Q And what if anything happened when you arrived
19 back at the dumpster?

20 A We looked at the material and found out that
21 labels had been cut out of the cartons; however, we did find
22 some labels. One in particular was Tioga Industries.

23 Q Did you conduct any investigation concerning
24 the label you found, Tioga Industries?

25 A Yes. I telephonically contacted the New York

Nadler - direct

office, in particular, my squad, to determine whether or not there had been any theft with regards to any Tioga Industry material.

I was informed that on October 22, 1972, a truck containing Tioga material had been hijacked in Brooklyn. →

Q Did you conduct any investigation to determine whether or not the cartons you found in the dumpster on November 10th were in fact part of the shipment of Tioga materials that were stolen?

A From my understanding, yes, it was.

MR. WEISSWASSER: I object to his understanding.

MRS. ROSNER: Objection.

THE WITNESS: Yes.

THE COURT: What's the objection?

MR. WEISSWASSER: Obviously he's modifying his language. I don't know what that means, to his understanding. If he conducted an investigation, either found out certain things or he didn't find them out.

THE COURT: If he had said "certainty," you would have objected, because he should be uncertain. But under the circumstances, the objection is overruled.

MRS. ROSNER: Your Honor, I object unless he's testifying from personal knowledge, your Honor, because

1pm
mm/nc

Nadler

AFTERNOON SESSION

ROBERT C. NADLER, having
been previously duly sworn by the Clerk of the Court,
resumed the stand and testified further as follows:

THE COURT: I will take the attorneys at side
bar at this time.

(Side bar discussion out of the hearing
of the courtroom spectators as follows:)

THE COURT: I understand that the records that
the Court requested are not here.

MR. SCOTTI: That is correct.

THE COURT: Will you explain it?

MR. SCOTTI: On going back to the office and
discussing it further with Agent Nadler and his calling
his office in New York, I was apprised that the
informant file would not be allowed to leave the FBI
premises nor would copies of the file be allowed to
leave the premises for the purpose of Mr. Nadler
testifying.

Of course, this would not include a Court
Order for the production of the records for an in
camera inspection. It was not my understanding that
that is what your Honor intended and on my authority
I told them not to get them and I will take full

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Nadler

responsibility for that.

THE COURT: Is there any reason for that?

MR. SCOTTI: The reason is strictly a security reason. They don't allow informant records out. That's number one.

Number two, Mr. Nadler does have certain dates regarding his contact with the informant. However, at this point I would object to any further specificity by Mr. Evseroff or any other counsel should they choose such a line as to pinpointing exact dates and times and maybe places or whatever regarding Mr. Nadler's contact with the informer because it is my opinion these questions are not relevant to the issues before the Court and designed solely to disclose the identity of the informant.

THE COURT: Is there some reason that you feel he may not be safe?

MR. SCOTTI: Exactly, your Honor. My information is that his life would be in very serious jeopardy.

MRS. ROSNER: Might I make a request?

THE COURT: Surely.

MRS. ROSNER: On the last point, if the Government has a good faith belief that this individual may

be in danger, I ask that the Assistant submit an affidavit in camera to be sealed and preserved stating the reasons known to him why this individual may be in danger.

While I can understand why Mr. Scotti may not want that known to defense counsel he shouldn't have any objection for it to be known to the Court and sealed for review.

Agent Nadler, as I recollect, was to do several things simply to refresh his recollection concerning the dates and that could be done without the records leaving FBI headquarters and I request that be done.

THE COURT: That's one of the things he requests not to be done.

MRS. ROSNER: Taking that point somewhat out of turn, the prosecution opened the door to these questions by eliciting information to support the proposition that the search was legal concerning earlier clips by the informant and one of the questions is, at what point in time they were given and exactly what was said and how it was corroborated.

THE COURT: For what purpose do you say these are relevant?

MRS. ROSNER: They become relevant when:

Nadler

Government introduces evidence of unreliable informant's information prior to the date of the actual search.

THE COURT: We don't have any such thing.

MRS. ROSNER: The Government introduced such evidence, unreliable. They take the position that this individual has never given information resulting in an arrest or conviction but called and without indicating the basis for his knowledge, gave certain information which they then corroborate and there were several corroborates with the same informant which related to the same premises.

They introduced this probable cause to believe there was criminal activity on the morning of November 15th. Taking the case from November 15th forward and ignoring anything further, the Government would concede there is no probable cause.

THE COURT: That isn't what you have here exactly.

MRS. ROSNER: If I understand the evidence and all of it is not in yet --

THE COURT: It is not in yet.

MRS. ORSNER: When the agents arrive at the drop on the morning of November 15, all we know is they see the 4 Gs truck pulling out and the Hertz van

Nadler

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going in and they pull the truck over. On what we have so far they need the informant and corroboration of the informant before November 15 to make their case.

THE COURT: That's your position?

MRS. ROSNER: Anything I say is the context of an opinion.

THE COURT: Well --

MRS. ROSNER: I submit they need the informant's information to establish their case. They couldn't preclude defense counsel from going into the amount of contact and what kind of contact.

He may have given information which proved to be erroneous when the agents tried to corroborate it.

THE COURT: You can ask him.

MR. SCOTT: You can ask him and not pinpointing dates and times, etc.. I have no objection to questions asked concerning that kind of inquiry.

I feel it is completely irrelevant as to the exact dates and times of these communications. I can't see any justification to find out the identity of the informant.

MRS. ROSNER: No one is trying to do that.

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Nadler

Mr. Evseroff asked -- well, nobody is trying to do that. I think the dates are relevant because if this informant gave information on a daily basis which was corroborated that would be something to go into.

I think the frequency and nature of the information is relevant whether the informant was corroborated as to the existence of probable cause. I move to strike anything about the informant's information if the Government takes the position and --

THE COURT: You would accept an affidavit from the Government to be given to the Court in camera and sealed and maintained for Appellant review?

MRS. ROSNER: Only on the issue of the existence of the informant's life should his identity be revealed. There is no way counsel could be precluded from going into the dates, nature of contacts with the FBI -- it is only with respect to his identity.

THE COURT: You feel you have a right to know the dates?

MRS. ROSNER: Yes.

MR. WEISSWASSER: If Mr. Scotti is concerned -- and I am not saying rightfully or wrongfully, about the safety of the informants, I think we should have

Nadler

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2 the dates whether these meetings were in person or
3 telephone. The exact time if Mr. Scotti feels they
4 shouldn't be divulged, that's all right but the dates
5 should be given if they want to establish probable
6 cause.

7 How do they establish probable cause --

8 MR. SCOTTI: The witness testified late in
9 October he received information, -- he received
10 information in October which he later corroborated.
11 The specific date doesn't make any difference to the
12 agent's testimony or adds in any way to any possible
13 defense that may be available.

14 He also testified that on the 15th of November
15 he received information from this informant concerning
16 the same premises. He testified what that information
17 was and what he did after receiving that information.
18 I see no benefit at all for going into the specific
19 dates, times and places, types of communications other
20 than what has already been testified to for purposes
21 of this hearing.

22 MR. WEISSWASSER: I haven't asked for times
23 or places.

24 MR. SCOTTI: Mr. Evseroff is becoming specific
25 in his questions and I think he will be doing that from

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Nadler

now on.

MR. EVSEROFF: What Mr. Scotti is saying in words or substance is that under the guise of protection of the informant, we are precluded from cross-examining a man whose credibility is put in issue by virtue of direct testimony.

THE COURT: You mean the agent?

MR. EVSEROFF: Yes. He has testified on direct examination about an informant. He has testified that he has spoken to this informant on a number of occasions, met him on a few occasions and I think on the question of believability or credibility all relating to the question of probable cause, we have a right to know when it was he claims that he spoke to the man or woman or whoever it may be and under what circumstances and what was told to him.

On the question of believability, on the question of probable cause, I agree and I certainly have not asked him anything about the identity of this person nor have I asked him where he met the man or when or anything of that sort. But I do believe on the vast amount of discovery available in this court that when someone gets on the witness stand they place their credibility in issue.

Under the allegation by the Government that

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Nadler

their informant would be in jeopardy, you couldn't preclude the cross-examination of a witness and inquire into the credibility of a witness on that basis.

It is a violation of the Constitution to do that.

MR. SCOTT: I don't object if he had a conversation with the informant, what he told him what he did to corroborate that, what he did to find out whether the information was reliable. All I am saying is he can ask his questions regarding the informant of this agent without getting into the specific dates.

MR. EVSEOFF: Arguendo, supposing I were to ask him and you were to allow me to ask him about specific dates and the records that he had would indicate that on October 20 he spoke to this informant when we could establish this man was in St. Louis on that day, I think that would be relevant.

I think Mr. Scotti is suggesting to preclude cross-examination with respect to the question of credibility of a witness.

MRS. ROSENER: One other point, in describing the issues at the hearing Mr. Evseoff noted we are exploring the question of probable cause and as the testimony came in this morning and we learned

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Nadler

1 about this late October tip I began thinking that
2 another line of argument to be advanced here is whether
3 the Government should have obtained a search warrant
4 prior to making the search because of their learning
5 of this at that particular premises.
6

7 THE COURT: It would be very weak at that point.

8 MRS. ROSNER: Dates being relevant. Let's
9 assume we learn on October 26th or whatever date
10 other information was given, corroborated, and so
11 on with respect to this premises up to November 15th,
12 I think it is open for counsel to argue because of
13 these contacts, warrants should have been obtained --

14 THE COURT: Maybe you should have been the
15 attorney for the Government who did that. Since
16 none of that was done, I see no reason. If you were
17 the attorney for the Government maybe that's what they
18 would have done but you weren't and, therefore, under
19 those circumstances I say no.

20 MRS. ROSNER: Counsel should be entitled to
21 explore the dates when contact was made with the
22 informant in order to advance the argument that
23 sufficient grounds existed and time existed to procure
24 a warrant either --

25 THE COURT: Listen you want explore Governmetn's

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Nadler

strategy and that's Government's business.

MRS. ROSNER: I don't agree. It isn't a matter of strategy. We have a situation where the Government has shown we have information about these premises at least three weeks before the final search and the issue comes up whether they had ground to get a warrant.

THE COURT: I don't agree with you.

MR. SCOTTI: If Mrs. Rosner is saying she should have the dates, I don't feel that that in any way forms any basis for justification for getting these dates because there wasn't a warrant.

The argument is not whether or not the Government should have gotten an argument. The issue that has to be decided here is whether or not the warrantless search was proper and legal, not whether or not the Government should have gotten a warrant.

If that's the reason she wants these dates that's no reason at all.

MRS. ROSNER: I wanted the record to be clear because I am not sure Mr. Scotti got the thrust of my remarks. It is not a matter of strategy or judging the search by the fact it was warrantless. An argument can be made only after we explore everything

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Nadler

that a warrant should and could have been obtained.

They don't have the option there. The preference of the fourth amendment is a search by warrant issued by a neutral magistrate.

THE COURT: Your application is denied.

MR. WEISSWASSER: Do I understand the Government's position to be that the Government is attempting to justify this seizure by virtue of the fact that they had a right to make an arrest at that time and it is not the Government's position this was a search conducted without a warrant because of the emergency and they didn't have time to get a warrant.

MR. SCOTTI: If you are asking whether I am saying this is a search incident to an arrest, that is not our contention. Our contention is they had probable cause to stop the truck. Once it was stopped and the goods inside were identified and they knocked on the door and didn't enter the premises and the defendants fled out the back door leaving it open, once the Government agents were standing on the premise and saw the goods they had a right to go and look for what was in there.

MR. WEISSWASSER: I don't understand Mr. Scotti's objection to the dates. I don't understand your ruling that the dates are not important. The Government

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Nadler

go into that area.

You may bring that in in your summation at the conclusion of the hearing. If you wish you may cross-examine for whatever information you may be entitled to under the circumstances.

MR. COHEN: I have one question.

I was wondering, it is not beyond the realm of possibility that perhaps no informant existed. That is one of the bases that defense counsel has a right to explore. I

THE COURT: If it is necessary we will put it in an affidavit and the Court will seal and preserve it.

MR. COHEN: I wonder if you would see fit to question the agent in camera. If you felt --

THE COURT: I'd rather he put it in an affidavit as to that and I will seal the affidavit and it can be reserved.

MR. COHEN: Then the affidavit would have to include not only the reason that the Government feels this informant would be in jeopardy but also contain facts that there is an informant.

THE COURT: That would be in the affidavit.

MR. SCOTTI: I am at a little bit of a loss why an affidavit should be made.

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3 1 Mr. Scotti spoke about that affidavit that I
2 believe he was going to submit to your Honor and --

3 THE COURT: No. He is going to give me the
4 reports of the dates, times and places for an in-camera
5 inspection, not an affidavit.

6 MR. COHEN: That's on the contact with the
7 informant.

8 THE COURT: On the contact with the informant.

9 MR. COHEN: But I also understand that there
10 will be a representation in camera delivered by the
11 U.S. Attorney as to who the informer was.

12 THE COURT: I don't think that was agreed to.
13 It is just as to the dates, times and places that
14 Agent Nadler met with the informant.

15 MR. COHEN: I wonder, in view of the many
16 decisions -- I don't think I would have made this
17 application, frankly, fifteen or twenty years ago --
18 but I think in view of the many cases that have arisen
19 both statewide and occasionally sometimes unfortunately
20 federal-wide, many judges do require that the informant
21 be named. Just -- absolutely only for an in-camera
22 inspection, just to verify the fact there was an
23 informant.

24 THE COURT: Well, I won't require it at this
25 time. I will just require the dates, times and places

1 not related to the communication in October."

2 Again, to clarify, it is a fact that you did not see
3 this informant approximately 10 days before the 15th of
4 November?
5

6 A Yes, that is true.

7 Q You saw the informant, and that was sometime in
8 October of 1972?

9 A Yes, sir.

10 Q You spoke to the informant twice on the telephone
11 thereafter?

12 A Yes.

13 Q The last time you spoke to the informant on
14 the telephone we have established was November 15th? The
15 judge told us that, is that correct?

16 A Yes.

17 Q That is the day of the search and seizure and
18 the arrest in this case, is that correct?

19 A Yes.

20 Q I would like to know what was the date of your
21 telephone conversation with this informant prior to November 15.

22 A (No response.)

23 Q If I may be permitted to know that.

24 MR. SCOTT: I would object to that, your Honor.

25 THE COURT: Anything further on the objection?

1
2 MR. SCOTTI: Just for the reason sustained
3 yesterday, I don't think it's relevant to know the
4 exact date of communication.

5 THE COURT: I don't see it as prejudicial that
6 he knows the date. We won't permit him to go further.
7 I don't see knowing the date to be a prejudicial factor.

8 MR. EVSEROFF: I didn't ask where the call was
9 made from --

10 MR. SCOTTI: It may become -- if Mr. Evseroff
11 intends to go into the conversation, the date may take
12 on special significance which it normally would not
13 have.

14 MR. EVSEROFF: Your Honor, if we are examining
15 on a motion to suppress, the question of what probable
16 cause the agents had for going where they did and doing
17 what they did and seizing what they did, and we were
18 told on direct examination the predicate of all this
19 was an informant, I would think what we would be
20 entitled to know, what it was the informant told him
21 and when it was the informant told him these things,
22 with respect to his direct testimony in connection
23 with his activities, so that the Court might have an
24 opportunity to ascertain whether or not all of this was
25 done legally and properly and in conformance with the

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2 cases.

3 I don't see where the United States Attorney
4 can get up and incessantly raise the scepter of security
5 with respect to the informant when we haven't asked
6 the name of the informant.

7 He had tendered this witness who testified on
8 direct examination that there was an informant. He
9 testified on direct examination that sometime in the
10 latter part of October, 1972, the informant told him
11 certain things.

12 THE COURT: Mr. Evseroff, I am disposed to have
13 him give you a date.

14 MR. SCOTTI: Your Honor, I anticipate
15 Mr. Evseroff asking, after he asked the date, if you
16 direct it be given, then he would ask what the
17 information was that the informant gave to Agent Nadler.

18 THE COURT: He will ask that anyway.

19 MR. SCOTTI: I don't object to that question.
20 The question I object to is the date of the information.
21 Mr. Evseroff certainly now at this point has a time
22 reference. He knows there were three contacts, one
23 was in October, and he has the last date. Contrary
24 to Mr. Evseroff's claims, I do have a duty to protect
25 the integrity of the informant -- not the integri

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Nadler-cross

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Q He told you the location of this particular drop, did he tell you what street it was on?

A Yes.

Q What street did he tell you it was on?

A He said in the vicinity of Metropolitan and Flushing Avenues.

Q I see. When you went there on -- withdrawn. Did he tell you what the address was?

A No.

Q Did you ask him?

A Yes.

Q What did he say?

A He didn't know.

Q Did you ask if he had ever been in this particular location, inside?

A I don't recall.

Q What you are telling us with respect to the substance of the conversation with this informant, am I correct in assuming that you are now able to recall this was as a result of perusing your notes that you made with respect to your conversations with your informant?

A Yes.

Q If there was anything else contained in the conversation, your best recollection would be limited by what

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2 in the car?

3 A No.

4 Q It wasn't you who placed Mr. Heidel or
5 Mr. Murgatroud under arrest, you weren't there?

6 A That's correct.

7 Q You stayed at the premises?

8 A Yes.

9 MR. EVSEROFF: Your Honor, I have no further
10 questions of this witness. Thank you, your Honor.

11 THE COURT: Thank you, Mr. Evseroff.

12 We will have cross-examination by Mr. Preminger,
13 the attorney for Mr. Murgatroud.

14 I might say to all of the defense attorneys
15 as to the informant, do not ask the times of day other
16 than the time on the 15th of November, which has
17 been brought out by this witness. As to a time of
18 day of any of the other phone calls or initial meet-
19 ings, please do not ask the time of day in cross-
20 examination.

21 BY MR. PREMINGER:

22 Q Mr. Nadler, I want to bring you back in time
23 to the incident with the Dempsey dumpster.

24 A Yes.

25 Q Is that on November 10th?

Nadler-cross/Rosner

it's 20 minutes to 5 on Friday afternoon; do you think --

THE COURT: If Mrs. Rosner can finish in 20 minutes I will let her finish. If it's going over --

MRS. ROSNER: I will be done in 10 minutes.

THE COURT: Take five minutes.

(A recess was taken at this time.)

THE COURT: All right.

MRS. ROSNER: Your Honor, the defense has agreed -- Mr. Evseroff and myself have agreed that we would not have an objection to the agent reading so much of his report that reflects what was seized on --

THE COURT: The items seized?

MRS. ROSNER: Yes.

THE COURT: Let him.

MR. WEISSWASSER: No objection to that.

THE COURT: Just the items seized, read it.

November 10th.

A An examination of the Dempsey dumpster disclosed that the discarded empty cartons, some of which contained metal bands with the address cut off, contained labels reflecting the names Gemco Textile, Brooklyn, New York, to Continental Piece Die Works, 15-19 First Avenue, Patterson, New Jersey, Tioga Textile, 469 Seventh Avenue, New York City, with No. 73 in red, Philip Kramer, Incorporated, 227 West

Nadler-cross/Rosner

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29th Street, New York City, Tioga Textile, York, Pennsylvania, Wolfberg Textile, 99 Madison Avenue, New York City, from Hazleton Weaving, West Hazleton, Pennsylvania to Slatex, Incorporated, 102 Madison Avenue, New York City.

Q Now, were these labels marked as evidence and taken away from the scene?

A Yes.

Q And do you know whether they still exist and are at FBI Headquarters?

A I don't know.

Q You say the Tioga labels related to some theft you later ascertained after leaving the dumpster?

A Yes.

Q Let me show you what has been marked as Court Exhibits 2, 3, 4, 5 and 6 and specifically directing your attention to Court's Exhibit 6, that is the picture of the dumpster as you found -- withdrawn.

That is a picture after you had emptied it on November 10, correct?

A Yes.

Q Now, on that picture, Agent Nadler, the rear of the dumpster appears to be open?

A Yes.

Q Now, am I correct that was the condition that

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MR. SCOTTI: What is the Government's position?

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MS. ROSNER: He has answered that. It is in our brief. He says that the evidence was destroyed.

4

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THE COURT: As I understood it, he was to check and make sure.

6

7

MS. ROSNER: He communicated with me --

8

THE COURT: I am glad he did with you. I want him to do so on the record. He did not do it with the Court.

9

10

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Please tell me what it is.

12

MR. SCOTTI: Agent Boling checked yesterday and it appears -- it doesn't appear, the cartons that were seized by the FBI in November 10, 1972 at the Dempsey dumpster were destroyed.

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THE COURT: They are no longer in the possession of the FBI?

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MR. SCOTTI: No, your Honor.

19

THE COURT: I will hear Mrs. Rosner. I wanted it on the record. The record was not complete as to that.

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MS. ROSNER: Mr. Scotti also told me that the labels that were seized were also destroyed.

23

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THE COURT: That I want, too. I do not understand that.

25

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2 MR. SCOTTI: The labels were also destroyed.

3 Your Honor, I might state, it is from my
4 information that the labels and the cartons were not
5 given an FBI file number which corresponded to this
6 particular case.

7 THE COURT: To the case that is before the Court
8 today?

9 MR. SCOTTI: Yes, your Honor. They were given
10 another FBI file number on another investigation, which
11 did not result in an arrest or complaint or indictment
12 or any other process, and at the termination of that
13 investigation the evidence was destroyed.

14 THE COURT: Yes, Mrs. Rosner?

15 MS. ROSNER: Your Honor, there were also some
16 remarks in the record during our last session on
17 Tuesday concerning the possibility that some other
18 case might have been pending, that was dismissed.
19 Mr. Scotti informs me that there was no other case
20 pending or dismissed.

21 We cite some authority in our brief on page 11--

22 THE COURT: I do not want to get into that yet.

23 MS. ROSNER: On the issue of whether I rest,
24 your Honor, I was going to address myself to that
25 question.

1
2 THE COURT: I was going to permit you to rest,
3 unless you intend to put on evidence.

4 MS. ROSNER: Your Honor, based on the authorities
5 in our memorandum I believe that the unexplained and
6 unjustified destruction of the evidence requires that
7 that portion of the evidence relating to the events of
8 November 10th be stricken.

9 Should your Honor --

10 THE COURT: You are making a motion to that
11 effect?

12 MS. ROSNER: If I could just finish.

13 Should your Honor reject that proposition, I
14 would move for a hearing as to the reason and the
15 circumstances surrounding the destruction of the
16 evidence, relying on the Supreme Court's decision in
17 United States v. Algenbluck, and the D.C. opinion in
18 United States v. Bryant. To that extent, I do rest.

19 THE COURT: This will be something in addition
20 to what is before the Court.

21 MS. ROSNER: Yes, your Honor.

22 THE COURT: Let us finish with what is before
23 the Court now.

24 MS. ROSNER: Based upon Mr. Scotti's statement
25 to me yesterday, that there was indeed a destruction --

1
2 THE COURT: You have something else? I would
3 like to finish with what is before the Court now.

4 MS. ROSNER: There is something before the
5 Court --

6 THE COURT: It is a motion to suppress and that
7 is what I am on now. If you want another hearing at
8 any time you can ask for that.

9 MS. ROSNER: In connection with the motion to
10 suppress, I move to strike evidence of the events of
11 November 10th on the basis of Mr. Scotti's statement
12 to me that within the language of the Bryant opinion,
13 highly relevant evidence has been destroyed by the
14 Government.

15 THE COURT: Motion denied.

16 MS. ROSNER: Thank you, your Honor.

17 THE COURT: I want to know if you rest now.

18 MS. ROSNER: I take exception to your Honor's
19 ruling, that I may not have a further hearing.

20 THE COURT: I did not rule as to that, but if
21 you want it I will. Motion denied.

22 MS. ROSNER: Then I rest.

23 MR. COHEN: My defendant rests.

24 MR. WEISSWASSER: The defendant Ferrante
25 respectfully rests.

.jk
lpm Rl

AFTERNOON SESSION

1 THE COURT: The Court will not again go over
2 the facts in this proceeding, because the Court feels
3 that the facts have been amply set out in the record
4 and counsel have argued the facts sufficiently for
5 the purposes of this proceeding and everyone, I am
6 sure, is aware of that.
7

8 This Court finds that the search of the GGGG's
9 truck and the arrest of the defendants Murgatroud and
10 Heidel was entirely proper and consistent with the
11 requirements of the Fourth Amendment.

12 Searches of automobiles and other vehicles have
13 traditionally been viewed as presenting a unique
14 Fourth Amendment problem. The Supreme Court in
15 Carroll v. the United States, 267 U.S. 132, recognized
16 this distinction. There it was held that a warrant-
17 less search made of an automobile carrying liquor was
18 proper. The Court held that the search would be valid
19 when the officer had probable cause to believe "that
20 an automobile or other vehicle contains that which by
21 law is subject to seizure and destruction." The
22 Supreme Court expressly noted that the validity of
23 such a search was not dependent on a contemporaneous
24 arrest, Carroll v. United States, Chambers v. Maloney,
25 399 US 42, and Coolidge v. New Hampshire, 403 US 443 are

1 clear authority that once it had been determined from
2 previous information that the GGGG's truck did contain
3 a portion of the stolen merchandise, that the arrests
4 of Murgatroul and Heidel followed as a valid,
5 justifiable, and proper consequence of the search.
6 The Supreme Court has recognized that in those certain
7 and limited circumstances a search may precede the
8 arrest. Clearly, the exigent circumstances here
9 present were such as to make an attempt to gain a
10 search warrant a clear and practical impossibility.
11 We believe that in the face of the probable cause,
12 which the agents had, no search warrant was necessary
13 to stop the truck and the Ford, nor were arrest
14 warrants required to place Murgatroul and Heidel under
15 arrest. We find from all of the evidence adduced at
16 this hearing that the defendants Murgatroul and
17 Heidel were not under arrest, within the legal
18 meaning of that term, when the vehicle was stopped.
19 Rather, they were under "arrest" only after the
20 vehicle had been properly searched. Thus, in the view
21 of this Court the defendants were fully accorded their
22 Fourth Amendment protections.

23 As to the arrests of the defendants Vescera,
24 Lanza and Ferrante, the agents at the rear door of
25 1956 Flushing Avenue had more than probable cause to

3

1 arrest Vescera, Lanza and Ferrante. These agents,
2 in addition to all the previously ascertained
3 information, now knew that the GGGG's truck which
4 had been inside the premises, in fact, contained a
5 portion of the stolen merchandise in question. It is
6 also important to note that these agents observed
7 three men fleeing from the rear door of the drop after
8 being advised that other agents were approaching the
9 front door. This fact further contributed to the
10 agents' probable cause to believe that Vescera,
11 Lanza and Ferrante were fleeing the premises in order
12 to escape detection and arrest for being in possession
13 of stolen goods, knowing them to be stolen.
14 Therefore, the arrest of these fleeing individuals
15 was proper.

16 Subsequent to the arrest of Vescera, Lanza and
17 Ferrante, Agent Armstrong, while still on the public
18 sidewalk, observed through the rear door which had
19 been left open, a large quantity of cases of liquor.
20 Moreover, Agent Armstrong had no idea as to what other
21 accomplices might have remained within the drop in a
22 position to destroy evidence, to remove evidence, to
23 jeopardize the lives of agents and/or try to
24 facilitate the escape of the individuals already in
25 custody.

1 Under the totality of facts and circumstances involved,
2 it is respectfully submitted that the actions of
3 Agent Armstrong in immediately entering the premises
4 to determine whether or not other individuals were
5 present, was reasonable and proper. Speed here was
6 essential and only a thorough search of the premises
7 could have insured that no other individuals were
8 present and that the agents had control of all weapons
9 which they knew had been stolen, and which could be
10 used against them.

11 While inside the drop, the fact that stolen
12 merchandise was in plain view of Agent Armstrong cannot
13 in any way render invalid his observations of these
14 arguments and the subsequent seizure of these items
15 by himself and fellow agents. Once the agents had a
16 right to be where they were, they could seize anything
17 in plain view. The actions of the agents in this
18 case cannot be labeled as being proper or improper
19 under preconceived categories such as a search
20 incident to an arrest, or agents in hot pursuit.

21 Rather, it is the view of this court that the
22 actions of the agents must be taken in their totality
23 and viewed in light of the test of reasonableness
24 enunciated in the Fourth Amendment of the United
25 States Constitution.

5 1
2
3 As noted above, probable cause existed for the
4 agents to believe that stolen merchandise was
5 contained inside 1956 Flushing Avenue. At the time
6 when Vescera, Lanza and Ferrante attempted their
7 escape, it would be unreasonable, dangerous and indeed
8 could be characterized as dereliction of duty if the
9 agents had not apprehended these fleeing individuals
10 and immediately secured the premises to determine if
11 any other theft was involved. Therefore, regardless of
12 whatever label is used to generally describe the
13 action of Agent Armstrong, the fact remains that it was
14 reasonable and necessary under the circumstances.

15 Therefore, this action should not be held to be
16 violative of the Fourth Amendment.

17 As to the motion for an order suppressing the
18 introduction into evidence, upon the trial of this
19 indictment, a quantity of essence oils, a quantity of
20 watchbands, a quantity of chemicals, a quantity of
21 - cigarettes and various quantities of other miscellaneous
22 goods and other items of personal property, if any,
23 seized from any of the aforesaid defendants in
24 connection with or as a result of their arrest herein,
25 on or about the 15th day of 1972, is denied as to all
defendants.

Sandidge-recross/Weisswasser

1
2 Q Isn't it a fact that the perspiration is
3 absorbed into the cardboard?

4 A But it remains.

5 Q I am talking about an item seized immediately
6 at the crime scene which might have been handled 10, 15,
7 20 minutes before which would give a latent fingerprint.

8 A I couldn't say for 10 minutes. About the
9 same.

10 Q An hour?

11 A About the same probably.

12 Q In any event, no one tried to examine those
13 guns for fingerprints?

14 A No.

15 Q These gloves you remember lying on the floor,
16 you didn't pick them up?

17 A No, I personally did not.

18 Q No one picked them up?

19 A I can't recall.

20 Q In any event, they were not retained and
21 preserved for evidence to produce in Court today?

22 A No.

23 Q You did preserve and retain the yellow and
24 blue watch cap found in the premises?

25 A Yes. It was believed to have been used in

Sandidge-recross/Weisswasser

1
2 another crime --

3 MR. WEISSWASSER: If your Honor please, a side
4 bar.

5 THE COURT: We will have a side bar on that.

6 (Side bar discussion between Court and
7 counsel as follows:)

8 THE COURT: Yes sir?

9 MR. WEISSWASSER: I merely ask at this time
10 for a limited instruction to the jury that they are
11 to completely disregard and gather no inference from
12 that statement by the agent as to these defendants
13 or my client.

14 THE COURT: Anything, Mr. Cohen?

15 MR. COHEN: Just that.

16 MR. SCOTTI: Is defense counsel waiving the
17 opportunity to make a motion for a mistrial?

18 MR. WEISSWASSER: I am, but I would ask your
19 Honor to instruct the witness not to make gratuitous
20 statements.

21 MR. SCOTTI: I understand that the comment
22 was not proper but it was in response to a question
23 asked by Mr. Weisswasser with a smile on his face
24 while trying to get a point across to the jury. The
25 question was asked repeatedly. It was wrong for him

Sandidge-recross/Weisswasser

to make the statement, no question, but I submit it is not gratuitous.

MR. WEISSWASSER: I called for a yes or no answer.

THE COURT: Well, you have been going at the witness and he just came out with it. I don't think it was intentional.

MR. WEISSWASSER: I think he knows better.

THE COURT: Possibly.

(Conclusion of side bar discussion.)

(Following held in open court.)

THE COURT: Ladies and gentlemen of the jury, the Court requests that you disregard the last statement that the witness made, that the item was evidence of some other crime. There is no inference or presumption that these individuals on trial were involved in any other crime and if they are involved in this one, that you should find for yourselves.

Just as there is no inference or presumption that these individuals were responsible for the theft at the Airfreight warehouse there is to be no inference or presumption that they were involved in another crime crime.

You may proceed, Mr. Weisswasser.

(The trial continued with the presence of the jury.)

MR. WEISSWASSER: Good morning, your Honor.

THE COURT: Good morning.

MR. SCOTTI: Good morning, your Honor.

THE COURT: Good morning.

This is an application for a protective order.

Let the record indicate that Mr. Weisswasser has just handed up a two page affirmation to the Court in connection with this matter.

Have you just received a copy, Mr. Scotti?

MR. SCOTTI: Yes. I did.

THE COURT: Just this moment?

MR. SCOTTI: About a minute before, thirty seconds before you came out to the courtroom.

THE COURT: I will hear you, Mr. Weisswasser.

MR. WEISSWASSER: If your Honor pleases, this is an application for a protective order that in the event the defendant Anthony Ferrante takes the stand in his own defense that the Government be precluded from inquiring into his one and only conviction, that being a misdemeanor conviction for third degree possession of stolen property.

In this conviction, the defendant pleaded in 1971

1 and was sentenced to three years probation in 1971,
2 and the conviction was based upon an act which took
3 place in 1968.

4 I submit to the Court that the only possible
5 reason to go into that since character is not going to
6 be put into issue, your Honor, character will not be
7 put in issue in this case, will be the credibility of
8 the defendant upon the stand and just as any other
9 witness' credibility is put into issue.

10 Your Honor, to permit the Government to use this
11 issue in this regard is far -- well, the probative
12 value of that matter will be far outweighed by the
13 prejudice which will accrue to the defendant on a
14 matter and incident which took place some seven years
15 ago.

16 Certainly granting that it is a similar incident,
17 an incident of a similar nature, then why do I say
18 that the probative value is so far outweighed by the
19 prejudice, and that is because the jury has not been
20 trained in legal niceties and no matter what
21 instruction your Honor gives the jury that they are not
22 to consider or to take into consideration that in
23 establishing his guilt in this matter, that he had a
24 prior conviction, but only in weighing his
25 credibility, well, I don't think the jury, just as most

1 lawyers and judges have difficulty separating the two
2 concepts, judges being trained as they are and those
3 of us who work in the criminal court system every day
4 understand the niceties and what the probative value
5 is and we understand what the instructions should be,
6 but I submit that a defendant runs a very, very real
7 risk, and the Court would by denying this application
8 place the defendant in very serious jeopardy of being
9 convicted on this charge because once before he was
10 convicted on a similar charge.

11 Your Honor, if the defendant had to take that
12 risk, if your Honor denies the application, I will not
13 be able to put the defendant on the stand, and in fact
14 -- I don't blame the Court and I don't mean to
15 insinuate that it is the Court's fault -- but the
16 defendant would really be denied the right of
17 testifying in his own behalf because he could not run
18 that risk and I would not allow him or advise him,
19 I would tell him not to take the stand. But, your
20 Honor, he wishes to take the stand and if he takes the
21 stand he will testify as to his innocence and as to
22 his innocent presence at the scene.

23 THE COURT: Yes, Mr. Scotti?

24 MR. WEISSWASSER: Your Honor, this application
25 is made so the record will know under Rule 403 which

1 federal rules of evidence.

2 MR. WEISSWASSER: Well, Judge --

3 THE COURT: Thank you, Mr. Scotti.

4 Yes, sir?

5 MR. WEISSWASSER: May I just be heard
6 momentarily?

7 I don't know that I should be glad or sad that
8 that is Mr. Scotti's position because I really felt
9 that if the Government were going to point to any
10 legitimate purpose at all it would be the impeachment
11 of credibility.

12 The Government now states what clearly is the
13 reason they wish to question Mr. Ferrante, and that is
14 to show prior similar acts, and I submit to your Honor
15 that would clearly be improper in this case.

16 It is not a question of prior similar acts
17 because Mr. Ferrante acknowledged his guilt. That was
18 in 1968. He knowingly possessed, and I think in that
19 case it was some --

20 THE COURT: Maybe I should take a look at the
21 rule and check it.

22 MR. WEISSWASSER: If your Honor would just hear
23 me momentarily, I am not going to cover the old ground
24 I want to say something new.

25 In 1968, he knowingly took some twenty or thirty

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1 pairs of shoes. He knowingly possessed that and
2 admitted his guilt.
3

4 (continued next page)
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THE COURT: Of course you can also appreciate that this Court has a certain history with Mr. Ferrante in that he was recently tried and in that case I did not permit this prior similar act to come in, you must appreciate that there is a history here that is very disturbing to the Court, it is very disturbing because the Court cannot continue to overlook the fact of Mr. Ferrante's possessive actions.

I am not saying that he is guilty or he is not guilty, but you have got to appreciate the Court's position.

MR. WEISSWASSER: I would most respectfully point out to the Court that the prior trial, although coming prior in time --

THE COURT: If I had permitted it in that trial, that is the use of this situation, Mr. Ferrante might have had another problem.

Now it was a different problem in the other trial, that is was the Government took that position.

MR. WEISSWASSER: It was a different problem in the other trial?

. THE COURT: Of course there are actions here which are before the Court and the Court is not looking with blindness at what is happening here.

MR. WEISSWASSER: I'm sure not but I wish your

1 THE COURT: All right, on the motions by Mr.
2 Weisswasser and application for a protective order,
3 the application for a protective order brought on by
4 Mr. Ferrante to preclude the Government from any
5 line of questioning regarding the defendant's prior
6 conviction should the defendant take the stand in his
7 own defense is denied. Under Rule 404, evidence of
8 other crimes, wrongs or acts is not admissible to
9 prove the character of a person in order to show
10 that he acted in conformity therewith.

11 However, under Rule 404, evidence of other
12 crimes may be admissible for other purposes, such
13 as proof of motive, opportunity, intent, preparation,
14 plan, knowledge or absence of mistake or accident.

15 Here the Court finds that the probative value
16 of such evidence clearly outweighs any possible
17 prejudice to the defendant. The Court also notes
18 in passing that the arrest in 1968 is not so far
19 remote in time from the transaction set forth in
20 this indictment as to be excludable because of any
21 claim of remoteness by the defendant.

22 Accordingly, the defendant's application for
23 a protective order is denied and the Government may
24 consistent with Rule 404B, over such prior similar
25 act evidence. That is the Court's decision.

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